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No. 514

In the Supreme Court of the United States

OCTOBER TERM, 1938

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BENJAMIN FAINBLATT AND MARJORIE FAINBLATT, INDIVIDUALS, DOING BUSINESS UNDER THE FIRM NAME AND STYLES OF SOMERVILLE MANUFACTURING COMPANY AND SOMERSET MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered on July 28, 1938, denying the petition of the National Labor Relations Board for enforcement of its order against Benjamin Fainblatt and Marjorie Fainblatt, individuals, doing business under the firm name and style of Somerset Manufacturing Company.

OPINIONS BELOW

The original findings of fact, conclusions of law, and order of the National Labor Relations Board (I. R. 467–495)[1] are reported in 1 N. L. R. B. 864. The supplemental findings of fact and the amended order (II. R. 227–239) are reported in 4 N. L. R. B. 596. The opinion and dissenting opinion in the Circuit Court of Appeals (I. R. 514–521) are reported in 98 F. (2d) 615.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 28, 1938 (I. R. 521). A petition for rehearing filed by the National Labor Relations Board (I. R. 521–522) was denied on September 8, 1938 (I. R. 522). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the National Labor Relations Act may be validly applied to respondents, employers whose business consists of the processing of materials belonging to others, where the major portion of such materials are delivered to such employers through the channels of interstate commerce and, after

[1] The record in the court below is in two volumes, separately paged. Volume II contains the supplemental proceedings pursuant to the order of the court below dated October 15, 1937 (II. R. 13–14). The first volume will be referred to herein as "I. R." and the second as "II. R."

processing, are in large part distributed through the channels of interstate commerce.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. III, Title 29, Sec. 151 *et seq.*) are set out in the Appendix, *infra*, p. 16.

STATEMENT

Pursuant to Section 10 (b) of the National Labor Relations Act, the National Labor Relations Board, on January 28, 1936, issued a complaint (I. R. 7–10), a copy of which, together with a notice of hearing (I. R. 11), was duly served upon respondents. The complaint alleged, in substance, that respondents had engaged in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (3), and (5), and Section 2, subdivisions (6) and (7), of the Act (I. R. 10). Respondent answered on February 4, 1936 (I. R. 12–16). On February 15, 1936, the Board, acting pursuant to Article II, Section 35, of its Rules and Regulations, Series 1, as amended, transferred the case to itself (I. R. 468). A hearing was held on February 17, 18, and 19, 1936, before a Trial Examiner designated by the Board (I. R. 17–431). Respondents, although they appeared at the hearing and were offered full opportunity to participate, called no witnesses and introduced no evidence. Thereafter, the Board directed the Trial Examiner

to prepare an intermediate report, which was duly filed and served upon respondents (I. R. 433–467). On June 3, 1936, the Board issued findings of fact, conclusions of law, and order (I. R. 469–495).

On June 17, 1937, the Board, pursuant to Section 10 (e) of the Act, petitioned the United States Circuit Court of Appeals for the Third Circuit for the enforcement of its order (I. R. 500–508). Thereupon respondents filed with the court a petition for leave to adduce additional evidence before the Board (II. R. 1–12), alleging in substance that they had failed to call witnesses and introduce evidence at the former hearing because they then believed that the Act was unconstitutional, or, if constitutional, not applicable to respondents, and that the situation at the plant had changed in several material respects since that time. On October 15, 1937, the court granted the petition (II. R. 13–14). Thereupon a second hearing was held on October 22 and 25, 1937, before a Trial Examiner duly designated by the Board (II. R. 18–226). On December 17, 1937, the Board issued a supplemental decision (II. R. 227–239) in which it reaffirmed its original findings of fact, conclusions of law and order, except that the order was modified in one respect referred to below. The facts, as found by the Board and supported by the evidence, may be summarized as follows:

The nature of respondents' business.—Respondents Benjamin Fainblatt and Marjorie Fainblatt are individuals doing business under the name of

Somerset Manufacturing Company,* with their plant at Somerville, New Jersey (I. R. 473–474).

Respondents are engaged in the processing of materials into various types of women's sport clothing (I. R. 474). They perform their work exclusively upon materials owned and supplied by Lee Sportswear Company, a partnership located in New York City (I. R. 474). The raw materials upon which respondents work is usually first cut by the Lee Sportswear Company in New York City and then shipped to respondent in New Jersey. Sometimes the raw material is shipped at the order of Lee Sportswear Company directly to respondents from the mills, many of which are outside the State of New Jersey (I. R. 474–475). Title to the material remains throughout in Lee Sportswear Company (I. R. 474).

As soon as possible after the raw material is received it is made up into finished garments, which are then delivered to a representative maintained by Lee Sportswear Company at respondents' plant (I. R. 475). Some are shipped directly to customers of Lee Sportswear Company throughout the United States; the rest are shipped to the company itself in New York City (I. R. 475).

Throughout the year there is a constant flow of shipments of raw material from points outside the State of New Jersey to respondents' plant, and of

*Respondents also at one time registered their business as Somerville Manufacturing Company. This name was discontinued in February 1935 (I. R. 473–474).

finished goods from the plant to New York City and other points outside New Jersey (I. R. 476). Respondents apparently finished a thousand or more dozens of finished garments each month in 1934 and 1935 (I. R. 490). In 1937, at the time of the supplemental hearing, respondents had increased their working force from 60 to approximately 200 employees (II. R. 234), and their output may be assumed to have increased in like fashion.

The unfair labor practices.—Following the invalidation of the National Industrial Recovery Act respondents instituted a series of severe wage cuts among their employees (I. R. 477). As a consequence, a number of workers employed in respondents' tailoring department joined Local No. 149, International Ladies Garment Workers Union (hereinafter referred to as the Union) and endeavored to organize the plant (I. R. 477–478). Respondents, learning of the employees' action, openly opposed the unionization campaign (I. R. 487). The mayor and the sheriff of Somerville, among others, were engaged by respondents to speak to the employees and attempt to dissuade them from joining the Union (I. R. 487–488). Between August 14 and September 18, 1935, respondents discharged eight women employees of the tailoring department because of their Union activity (I. R. 481–487, 492). In each case, the employee at the time of her discharge was told that she had been "making too much trouble" (I. R. 482, 484, 485–486, 486), or that if she wanted work she

could "go to the Union" (I. R. 483, 484, 485). None of the eight has been reinstated (I. R. 489).

On August 30, 1935, Harry A. Posner, business manager of the Union, having been designated by a majority of the employees in the tailoring department, an appropriate unit, as their representative for collective bargaining (I. R. 476–479), presented to Benjamin Fainblatt certain demands for the improvement of working conditions in the plant (I. R. 479). Fainblatt took the proposals under consideration, but on September 6, when Posner again spoke to Fainblatt, the latter said that he would have nothing to do with a union, and that he did not recognize Posner as the legal representative of his employees (I. R. 479–480). As a result, all the members of the Union went on strike on September 18, 1935 (I. R. 480), causing a considerable diminution in respondents' operations (I. R. 490). The strike was still in progress at the time of the original hearing (I. R. 480).

About two weeks after the strike began, Posner again attempted to open negotiations, but was informed by respondents' representative that "Mr. Fainblatt would not talk union or recognize anybody that had any connection with the union" (I. R. 480). At some later date another meeting was had, which also was fruitless (I. R. 480-481).

On the basis of these findings, the Board concluded that respondents had engaged in unfair labor practices affecting commerce within the

meaning of Section 8, subdivisions (1), (3) and (5), and Section 2, subdivisions (6) and (7) of the Act. It therefore entered an order (I. R. 493–495) requiring respondents to cease and desist from such actions; to reinstate to their former positions, with back pay, the employees found to have been discriminated against; to offer reinstatement to employees who had gone on strike where the positions held by such employees on the date of the strike were held by persons subsequently employed, and to place other strikers on a preferred list, to be offered employment when needed. In its order entered after the supplemental hearing (II. R. 237–239) the Board, because of evidence that respondents had greatly increased their working force, and a lack of evidence of the then membership in the Union, struck out the provisions of its original order which had required respondent to bargain collectively with the Union.

On July 28, 1938, the Circuit Court of Appeals for the Third Circuit denied the Board's petition for enforcement of its order (I. R. 521). Speaking through Judge Buffington, the court disposed of the case solely on the ground that respondents were not engaged in interstate commerce, and that the Act could not constitutionally be applied to them. Judge Biggs dissented (I. R. 517). On September 8, 1938, the Board's petition for rehearing (I. R. 521–522) was denied (I. R. 522).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the National Labor Relations Act could not validly be applied to respondents' operations.

2. In holding that the buying, selling, or transporting of raw materials or finished products in interstate commerce is a prerequisite to the application of the Act to a manufacturing enterprise.

3. In not holding that respondents, by their actions, had violated Section 8, subdivisions (1), (3) and (5) of the Act.

4. In denying enforcement to the Board's order.

REASONS FOR GRANTING THE WRIT

I

The court below has decided a question of the constitutional power of Congress in a way probably in conflict with the applicable decisions of this Court. The court below conceded that if the Act may validly be applied to respondents, the Board's order should be enforced. The sole question presented, therefore, is that of the power of Congress under the Constitution.

The facts stated above, pp. 4–6, show that a constant flow of goods moves in interstate commerce to respondents' plant in New Jersey, and that after prompt manufacture into finished products the goods pass again through the channels of interstate commerce to all parts of the United States. The

case, in other words, would be precisely similar to other cases in which this Court has sustained the application of the National Labor Relations Act to manufacturing enterprises, but for the single fact that title to the goods is never in respondents. It is this factor which is relied upon by the court below.

We submit that the holding of the court below that this factor serves to distinguish the prior decisions of this Court entirely misconceives the basis of those decisions. In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, the Court emphasized that Congress has power under the commerce clause of the Constitution to protect interstate commerce from burdens, obstructions, and interferences whatever may be their source. Activities in production industries such as respondents', which, when viewed separately, are local, may nonetheless, by virtue of their close and immediate relation to interstate commerce, be brought within the power of Congress. "It is the effect upon commerce, not the source of the injury, which is the criterion." 301 U. S. at 32. Since the decision below, the power of Congress in such situations has been strongly reaffirmed in *Consolidated Edison Co.* v. *National Labor Relations Board*, Nos. 19, 25, decided December 5, 1938. Clearly, in the present case, a strike or lockout resulting from a denial of the rights guaranteed by Section 7 of the Act would, and did (I. R. 490), burden the flow of commerce to and from respondents' plant. Title to the goods is irrelevant.

Many decisions, under both this and other stat-

utes, have made it clear that the niceties of title have no bearing upon the power of Congress to prevent burdens and obstructions to the flow of commerce. In *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, the employer contended that he was not subject to the Act, since his sales were all f. o. b. points in California. The Court specifically rejected the contention. 303 U. S. at p. 463. See also *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 72. In related fields, the Court has sustained the power of Congress to regulate commission merchants in the stockyards, although they took no title to the livestock, and to regulate grain exchanges, although they did not themselves engage in buying or selling grain. *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

II

The decision of the court below is also in conflict with two decisions of the Circuit Court of Appeals for the Second Circuit, *National Labor Relations Board* v. *National New York Packing & Shipping Co., Inc.*, 86 F. (2d) 98, and *National Labor Relations Board* v. *Hopwood Retinning Co., Inc.*, 98 F. (2d) 97. In the *National New York* case, that court held the Act might validly be applied to a company whose business consisted of the consolidating and arranging for transportation of packages received from or destined to out-of-state points. In the *Hopwood* case, the Act was held applicable to a company engaged in retinning and

servicing milk and ice cream containers belonging to out-of-state dairies and creameries (cf. 4 N. L. R. B. 922, 926). In neither case did the company have any title to or interest in the goods which were the subject of commerce. Yet in each case the jurisdiction of the Board was sustained.[2]

III

The decision below is of substantial public importance. It denies to Congress a power which it seems clearly to possess, and is, therefore, significant beyond the confines of the particular industry of which respondent is a part. Moreover, in that industry the decision would have a peculiarly widespread effect. The women's clothing industry, one of the largest and most important in the United States,[3] is one of the few major American indus-

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[2] The subsequent decision in *National Labor Relations Board* v. *Fashion Piece Dye Works, Inc.*, decided November 28, 1938, in which a differently constituted court in the Third Circuit distinguished the present case and upheld the jurisdiction of the Board, does not change the situation. The court, speaking of the present case, said:

"That case, however, is clearly distinguishable and is not controlling here because there it appeared that Fainblatt engaged in no interstate transportation whatever, whereas in the case before us the respondent itself transported at least fifty percent of the textiles to be processed into the state and the same percentage of the finished product out of the state."

Even as so limited, the decision is still completely inconsistent with the decisions of this Court, and in conflict with *National Labor Relations Board* v. *National New York Packing & Shipping Co.*, 86 F. (2d) 98 (C. C. A. 2d).

[3] In the year 1933, the latest for which comparative figures are furnished by the Bureau of the Census, the industry

tries in which the "contract" method of production[4] is still widely prevalent. In the year 1935, for example, of a total of 3,414 enterprises engaged in manufacturing women's dresses, 1,676, employing 63,202 workers, were shops in which a single firm owns, manufactures, and sells the finished prduct to the retailer,[5] while 1,738, employing 48,217 workers, were "contract" shops.[6] In the New York metropolitan area, the center of the American garment industry,[7] a survey made in 1935 revealed that 69 per cent of the enterprises engaged in manufacturing women's dresses, employing 78 per cent of the workers in the industry, were "contract" shops.[8]

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ranked ninth among manufacturing industries in number of workers employed, and eighth in value of product. United States Biennial Census of Manufacturers (Commerce Department, 1933), p. 33.

[4] "Contract" production may be defined as a method in which a "contractor" performs productive operations upon materials owned and furnished by a "jobber" who, in addition, usually designs the garment, cuts the cloth, and sells the finished product.

[5] The respondent in *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, was an enterprise of this character. See 301 U. S. at 72–73.

[6] United States Biennial Census of Manufacturers (Commerce Department, 1935), p. 33.

[7] In the year 1935 the total value of women's, misses', and children's clothing produced in the United States was $1,269,624,289, of which $883,375,777, or approximately 69 percent was produced in New York State. *Id.*, p. 398.

[8] See Sherman Trowbridge, *Some Aspects of the Women's Apparel Industry*, in United States National Recovery Administration, *Work Materials*, No. 44 (1936), p. 53.

CONCLUSION

The decision below is in probable conflict with applicable decisions of this Court. It conflicts with decisions in another Circuit Court of Appeals. The questions raised are of substantial public importance. Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit should be granted.

ROBERT H. JACKSON,
Solicitor General.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

DECEMBER 1938.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Supp. III, Title 29, Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

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